IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 3RD OCTOBER 2007 / 11TH ASWINA 1929

AS.No. 808 of 1994(A)

OS.48/1993 of SUB COURT,KATTAPPANA

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APPELLANTS/ PLAINTIFFS:

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1. N.ANANTHASIVAN, S/O.NEELAKANTA IYER,
   AGED 78 YEARS, RESIDING AT
   RUKMINI BHAVAN,
   PUTHENCHANTHAI, TRIVANDRUM. **(DIED)**

2. N.VISWANATHA IYER, S/O.NEELAKANTA IYER,
   AGED 74, RESIDING AT AMARAVATHY ESTATE,
   KUMILY KARA, KUMILY VILLAGE, IDUKKI DISTRICT.

ADDL.3. M.A.HARIHARAN, S/O.N.ANANTHASIVAN (DIED)
39/12, HIMAGIRI VRINDHAVAN GARDEN, CHALAI,
THIRUVANANTHAPURAM.

(IMPLEADED AS THE LEGAL REPRESENTATIVE OF THE
DECEASED FIRST APPELLANT, AS PER ORDER,
DATED 14.10.99, ON CMP.NO.5446/99)

BY ADV. SRI.N.L.KRISHNAMOORTHY
SRI.K.LAKSHMI NARAYANAN
SRI.D.ANIL KUMAR

RESPONDENTS:

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1. JOSEPH.J., S/O.MATHAI JOSEPH, AGED 26,
   RESIDING AT KANJIRATHUMKAL HOUSE, ATTAPPALAM P.O.,
   KUMILY, PEERMADE TALUK.

2. MATHAI JOSEPH, AGED ABOUT 55,
   RESIDING AT KANJIRATHUMKAL HOUSE,
   -DO- -DO-

3. SUSA, S/O.PHILIP, AGED ABOUT 28 YEARS,
   RESIDING AT AMARAVATHY ESTATE,
   KUMILY VILLAGE, MURICKADY P.O.,
   PEERMADE TALUK.

BY ADV. SRI.JOSEPH (PARTY)
SRI.MATHAI JOSEPH(PARTY)
SRI.SUSA(PARTY)

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 03/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

A.S.No.808 of 1994 & Cross Objection

Dated this the 3rd October, 2007.

J U D G M E N T

The plaintiffs in O.S.No.48/1993, on the file of the Sub Court, Kattappana, has filed this appeal, challenging the decree and judgment passed by the court below, dismissing the suit filed for recovery of A and B schedule properties, after demolishing C schedule shed, and also for damages. The suit was initially filed before the Sub Court, Thodupuzha, and numbered as O.S.No.177/1987. Consequent to the formation of the Sub Court, Kattappana, the same was transferred and re-numbered as O.S.No.48/1993.

2. The learned Senior Counsel, Sri.M.Krishnan Nair, who was appearing for the respondents died and there was no representation. So, on 24.7.2007, this Court had directed the office to issue notice direct to the respondents to appear before this Court on 5.9.2007. In spite of receipt of notice, they have not appeared in person or entrusted the matter to a counsel-advocate. Hence, they are declared ex parte, and the appeal is disposed of hearing the counsel for the appellants

3. The following are the material averments in the plaint. Plaint schedule properties formed part of a Tea Estate, by name, 'Amaravathy Tea Estate', comprised in Survey Nos.222, 223 and other survey numbers of Kumily Village, (formerly Periyar Village). The total extent of Survey No.222 comes to 374 acres and 91 cents, and that of Survey No.223 comes to 25 acres and 62 cents. The Amaravathy Tea Estate was having an area of 463 acres and 42 cents. The entire properties were purchased by Sri.N.Subramanian Iyer and Sri.E.Shahul Hameed Rawther under Ext.A1 sale deed, dated, 8.7.1943. Subramania Iyer purchased the property in his capacity as the Manager of the Hindu Undivided Family, known as "Mancompu Kizhakke Madom". According to the plaintiffs, he purchased the property for the benefit of Hindu Undivided Family, using the funds of the family. Plaintiffs are the brothers of Subramania Iyer. ON 14.6.1961, an agreement was entered into between Subramania Iyer and and Shahul Hammed, and the properties were partitioned by metes and bounds. 60 Acres of property comprised in Survey No.222 was allotted to Shahul Hammed, in full and final settlement of his claims over the assets of the firm. According to the plaintiffs, after 14.6.1961, the properties are in the possession and enjoyment of the

Hindu Undivided Family. It was also averred that in the year 1967, a partial family partition took place and Amarathy Tea Estate was allotted to the share of the plaintiffs. It was averred that they took possession of the same. It was further averred that plaintiffs are co-owners of the property, and were in joint possession and enjoyment of the Estate. At the time of partial partition, the entire properties belonging to the family were not partitioned. Hence, no partition deed happened to be executed and registered. But only a memorandum of partition deed alone was written. Plaintiffs 1 and 2 have got the right, title and possession over the plaint schedule properties, and the same were the part and parcel of the Amaravathy Tea Estate.

4. On 15.2.1987, first respondent along with his father approached first plaintiff and requested the first plaintiff to sell two acres of the Estate. They paid an amount of Rs.5000/= to the first plaintiff. A letter was written to the first respondent stating the conditions. The first plaintiff agreed to sell the land available behind the plaintiffs' staff quarters, and lies on the southern side of the ravine running close by, and the property is slopping towards the north. Thereafter, they paid an amount of Rs.5000/- on 11.5.87 and

Rs.20,000/= on 18.5.87. The first plaintiff had issued receipts for the amounts received. Thus, a total amount of Rs.35,000/= was paid. The defendants requested that they may be permitted to raise cultivation in One Acre of land proposed to be purchased by them. Accordingly, they were given a licence to cultivate in the One Acre of land. It was further averred that the defendants did not pay the balance amount, but they trespassed into B schedule properties, and reduced the same also into their possession. A shed was put up after uprooting about 25 tea bushes. Hence, the suit for recovery of plaint A and B schedule properties, after demolishing C schedule shed and also for damages.

5. Respondents filed a written statement contending that the suit is not maintainable. It was contented that plaintiffs were not the owners of the suit property, and they do not have title to the suit property. Share of Shahul Hameed, if any, as alleged, cannot be partitioned. Plaintiffs have not obtained title and they are not co-owners of the properties, including the plaint schedule properties. It was further averred that memorandum of partition cannot effect partition. Plaintiffs agreed to sell plaint A and B schedule properties to

the first defendant representing that they are the title holders, and accepted major part of the consideration, but they did not execute the sale deed, as they do not have title. Plaintiffs have cheated the first defendant who had spend a huge amount to improve the properties. Plaintiffs were representing that they are the co-owners and partners who owned Amaravathy Tea Estate, including plaint A and B schedule properties. The first plaintiff was styling himself as Managing Partner. On that pretext, they agreed to sell A and B schedule properties to the first defendant on 17.2.87, for an amount of Rs.20,000/= per acre. 2 ½ Acres were agreed to be sold. Properties were identified, but no written agreement was entered into. It was agreed that possession could be given only after payment of Rs.35,000/=. Rs.5000/= was paid to the first plaintiff on that date, and a receipt was also given. The first plaintiff insisted for a letter from the first defendant. Accordingly, a letter was given. Thereafter, an amount of Rs.5000/= was paid on 14.4.1987 and another amount of Rs.5000/= on 11.5.1987. Subsequently, further amount was paid on 18.5.1987 towards the sale consideration. The first plaintiff also requested the first defendant to pay an amount of Rs.10,000/= to one Thankamma, the mother of the 3rd defendant, and Rs.3,000/= to one Thankayya,

who were the labourers of the Estate. Those amounts were were also paid. It was contended that 2 ½ acres of land were put in possession of the defendants. Several attempts were made by the defendants to get the sale deed executed, but plaintiffs were evading and not willing to execute the sale deeds. Trespass alleged was denied. Defendants were put in possession of plaint A and B schedule properties, in pursuance of agreement of sale, and they put up C shed also. It was contented that house was numbered as No.405 of Ward No.VIII of Kumaly Panchayat, and defendants are residing in that house. It was contented that plaintiffs are not entitled to get any relief. It was further contented that defendants are entitled to plaint A and B schedule properties sold to them, and he was entitled to get the agreement for sale executed. Hence, prayed for dismissal of the suit.

6. First respondent filed O.S.No.43/1990 before the Sub Court, Thodupuzha, against the appellants, alleging that there was an oral agreement for sale, between himself and appellants, and he was entitled to get that agreement specifically enforced. That suit was also subsequently transferred to Sub Court, Kattappana, and re-numbered as O.S.No.49/1993. In that suit, the appellants filed a

written statement raising the averments they made in the plaint filed by them. Both suits were consolidated and tried jointly. The Trial Court found that plaint A and B schedule properties were purchased by Subramania Iyer under Ext.A1 document. The suit filed by the appellants was dismissed holding that they failed to prove their title over the property. The Trial Court also found that respondent were put in possession of the property under an agreement for sale, and they have paid an amount of Rs.48,000/= towards sale consideration, and the first defendant was put in possession of the property, in pursuance of the agreement for sale. The trial court further found that the terms of the agreement are uncertain and the plaintiff in O.S.No.949/1993 had failed to prove that there was a valid and enforceable agreement for sale and dismissed that suit also. Challenging the decree and judgment passed in O.S.No.48/1993, the plaintiffs have filed this appeal.

7. The respondents did not file any appeal against the dismissal of the decree passed, a memorandum of cross objection was filed in this appeal. The office had noted certain defects. The same was re-presented with an endorsement that the cross objection relates

to certain findings against the respondents, and was filed under explanation to Order XLI Rule 22 of Civil Procedure Code, and no court fee is payable. Cross appeal was received. Since the cross appellant and counsel were absent, today I have dismissed that cross appeal for default.

8. The learned counsel appearing for the appellant has argued that in view of the dismissal of the suit for specific performance, the court below ought to have decreed the suit filed by the appellants. It is argued that the findings in that suit had already become final and conclusive, on account of non filing of the appeal, and will operate as res judicata. It is argued that the court below had specifically found that the properties were purchased by Subramania Iyer under Ext.A1 sale deed, and there is no dispute regarding the averments that the plaintiffs and Subramania Iyer are members of a Hindu Undivided Family, and Subramania Iyer was the Manager of the family. It is argued that the specific case put forward by the defendants in their written statement, as well as in the plaint filed in the connected suit was that the appellants represent that they are the absolute owners of this property, and received an amount of

Rs.48,000/= from them, and put them in possession of the property, and as such, the plaintiffs are entitled to recover the property and defendants have estopped them from denying the title of the plaintiffs. It is also argued that in any event, the plaintiff is a co-owner in respect of the properties, and after the abolition of the Joint Family System Abolition Act, a co-owner is entitled to entertain an action to recover the property from a stranger, so long as he is not denying the right of other co-owners.

9. The Trial Court itself found that suit properties were purchased by Subramania Iyer and Late Shahul Hameed Rawther under Ext.A1, in the name of partnership. Ext.A2 shows that that partnership was dissolved and Shahul Hameed was given 60 Acres of property as shown in the plaint, appended to the Dissolution Deed. Ext.A3 is stated to be a memorandum of Partial Partition recorded on 30th December, 1967, by 12 members of the family. Subramania Iyer who was one of the purchasers under Ext.A1 sale deed was one of the executants of Ext.A3. Ext.A3 is a notary attested copy of the memorandum entered into by Subramania Iyer and others. In Ext.A3, there is an admission to the effect that executants of that documents

were members of a Hindu Undivided Family. There is also an averment that properties scheduled thereunder are the property owned by the joint tenants. So, even assuming that Ext.A3 is not sufficient to establish the out-rate partition, the evidence on record clearly establishes that plaintiffs and Subramania Iyer were members of Hindu Undivided Family, on account of the abolition of the Joint Family System, a notional partition has taken place. So, the status of the plaintiffs as co-owners is not disputed. Further, the specific case put forward by the defendants are that the plaintiffs put them in possession of that property, and plaintiffs-appellants made them believe that the appellants were the absolute owners of the property. The court below has not considered whether the plaintiffs are entitled to get recovery of the properties in their capacity as co-owners. Hence, I have no other option, but to set aside the decree and judgment passed by the trial court, and remand O.S.No.48/1993, to re-consider the same afresh, in accordance with law.

10. In the result, appeal is allowed. The decree and judgment passed by court below in O.S.No.48/1993, on the file of the Sub Court, Kattappana, are hereby set aside. The suit is remanded to the Trial Court for fresh disposal, in accordance with law.

Parties shall appear before the court below on 5.11.2007.

Half of the court fee paid by the appellants will be refunded to them.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

A.S.No.808 of 1994

J U D G M E N T

Dated:3rd October, 2007.